Ling Siok Seng v Ting Sieh Chung

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO Q–02–715 OF 1996
LAMIN PCA, ABDUL MALEK AHMAD AND AHMAD FAIRUZ JJCA
22 JULY 1997

Civil Procedure *— Time — Extension of time — Application for extension of time to serve notice of appeal on respondent — Notice of appeal sent to respondent's counsel — No personal service on respondent — Whether sufficient grounds to grant extension — Court of Appeal Practice Direction No 1 of 1996*

This is a motion by the appellant for an extension of time to serve the notice of appeal on the respondent. By this motion, the appellant also sought to file and serve the record of appeal on the respondent. The appellant's counsel had sent a letter (exh JAT2) to the respondent's counsel, enclosing the notice of appeal. However, the notice of appeal was not personally served on the respondent. In reply, counsel for the respondent stressed that the affidavit-in-support did not explain why the notice of appeal was not served on the respondent, nor was there an explanation as to why the appellant was late in applying to court.

Held, striking out the appeal:

Exhibit JAT2 showed that the notice of appeal was sent, but there was no proof of JAT2 having been mailed or faxed to the respondent. There was no evidence on the reasons for the non-service of the notice of appeal and the delay in making the application. As regards the filing and serving of the record of appeal, the affidavit-in-support showed that the appellant had applied for the notes of proceedings but had not, until the date of filing of their motion, received them from the High Court. The Court of Appeal's Practice Direction No 1 of 1996 required the appellant to immediately apply to the President of the Court of Appeal for extension of time to file the record of appeal in the event that the notes of evidence had not been supplied to the appellant within one month from the date the notice of appeal was filed. There were no sufficient grounds here to grant an extension of time to serve the notice of appeal and to file and serve the record of appeal on the respondent. As the notice of appeal had never been served on the respondent, the appeal therefore was incompetent and was not in existence (see pp 68B–G and 69C–D).

[Bahasa Malaysia summary

Ini merupakan usul oleh perayu untuk perlanjutan masa untuk menyampaikan notis rayuan kepada penentang. Menerusi usul ini, perayu juga ingin memfail dan menyampaikan rekod rayuan kepada penentang. Peguam perayu telah menghantar sepucuk surat (eks JAT2) kepada peguam penentang, dengan melampirkan notis rayuan. Namun demikian, notis rayuan tidak disampaikan secara

sendiri kepada penentang. Sebagai jawapan, peguam penentang menekankan bahawa afidavit sokongan tidak menjelaskan mengapa notis rayuan tidak disampaikan kepada penentang, dan tiada juga penjelasan mengapa perayu lambat dalam permohonan kepada mahkamah.

Diputuskan, membatalkan rayuan:

Ekshibit JAT2 menunjukkan notis rayuan telah dihantar, tetapi tiada bukti JAT2 telah dihantar menerusi pos atau difakskan kepada penentang. Tiada keterangan atas alasan-alasan untuk ketidaksampaian notis rayuan dan kelewatan dalam membuat permohonan. Mengenai pemfailan dan penyampaian rekod rayuan, afidavit sokongan menunjukkan bahawa perayu telah memohon untuk nota-nota prosiding tetapi sehingga tarikh pemfailan usul mereka masih tidak menerimanya daripada Mahkamah Tinggi. Arahan Amalan Mahkamah Rayuan No 1 tahun 1996 menghendaki perayu memohon kepada Presiden Mahkamah Rayuan dengan segera untuk perlanjutan masa bagi memfailkan rekod rayuan sekiranya nota-nota keterangan tidak dibekalkan kepada perayu dalam tempoh sebulan dari tarikh notis rayuan difailkan. Tiada alasan yang mencukupi di sini untuk memberikan perlanjutan masa untuk menyampaikan notis rayuan dan untuk memfailkan dan menyampaikan rekod rayuan kepada penentang. Oleh kerana notis rayuan tidak pernah disampaikan kepada penentang, maka rayuan tidak kompeten dan tidak wujud (lihat ms 68B–G dan 69C–D).]

Notes

For cases on extension of time, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 4857–4877.

Cases referred to

Lee Lan v Lim Yoon Loy & Ors [1991] 3 MLJ 419 (refd)
Pearson v Chen Chien Wen Edwin [1991] 3 MLJ 208 (refd)
Soh Keng Hian v American International Assurance Co Ltd [1996] 1 MLJ 191 (refd)
Yeo Yoo Teik v Jemaah Pengadilan Sewa, Pulau Pinang & Anor [1996] 2 MLJ 54 (refd)

Legislation referred to

Practice Direction No 2/91
Practice Direction No 1 of 1996

Appeal from: Suit No BTU 5 of 1994 (High Court, Bintulu)

Musa Dinggat (*Battenberg & Talma*) for the appellant.
Chong Siew Chiang (*Kadir Wong & Lin & Co*) for the respondent.

Ahmad Fairuz JCA (delivering judgment of the court): This is a motion by the appellant/plaintiff for an extension of time to serve the notice of appeal on the respondent. By way of this motion too, the appellant sought to file and serve the record of appeal on the respondent.

The affidavit-in-support of the motion discloses that:

(a) the judgment of the High Court in Sabah and Sarawak at Bintulu was given on 22 November 1996;

(b) the appellant's counsel's letter of 29 November 1996 (exhibited as 'JAT2') addressed to the respondent's counsel, enclosed the notice of appeal;

(c) the receipt proving the posting of JAT2 by registered mail could not be found;

(d) the respondent was 'aware of the notice of appeal as he responded to the appellant/plaintiff's application for stay of execution';

(e) the respondent's counsel's letter of 7 January 1997 also showed that the respondent was aware of the notice of appeal;

(f) the appellant had, on 23 December 1996, written to the senior assistant registrar, High Court Sandakan, requesting for the notes of proceedings; and

(g) the secretary to the learned High Court judge in Sandakan had written on 30 December 1996 to the senior assistant registrar, High Court Miri, requesting that the notes of proceedings be forwarded to the appellant.

In his oral submissions, learned counsel for the appellant conceded that the notice of appeal was not personally served on the respondent. This was due to the counsel's oversight. Nevertheless, learned counsel contended that exh JAT2 showed that the respondent was aware of the notice of appeal. As to merits, learned counsel claimed that there was forgery of the memorandum of transfer. The question of burden of proof as regards forgery is a point of law in issue. The learned judge, according to learned counsel, had held that the burden of proof is beyond reasonable doubt. Learned counsel, however, argued otherwise.

In reply, learned counsel for the respondent stressed that para 4 of the affidavit-in-support did not explain why the notice of appeal was not served on the respondent. Learned counsel also pointed out that the affidavit-in-support did not contain any explanation as to why the appellant applied to court late. As regards merits, learned counsel submitted that the judgment talked of fraud and consequently, the decision of the learned judge on the burden of proof was correct.

The learned counsel for the appellant submitted a number of authorities in support of his submissions, one of which was the case of *Soh Keng Hian v American International Assurance Co Ltd* [1996] 1 MLJ 191. This court in that case had also to consider an application similar to the one now before us. Gopal Sri Ram JCA, in delivering the judgment of the court, stated (at p 194):

> It is axiomatic that this court is seized of a wide discretion to extend time in proper and deserving cases. But, it is not an unprincipled discretion. There must be some relevant evidential material made available before the court may exercise discretion.

In the case presently before this court, the evidential material made available by the appellant are in the affidavit-in-support of the motion. Exhibit JAT2 shows that the notice of appeal was sent. But there is no proof of JAT2 having been mailed or faxed to the respondent. In fact, the appellant's counsel conceded that the notice of appeal was never served personally on the respondent due to an oversight of the counsel. This, however, was never mentioned in the affidavit-in-support. What was the nature of the oversight too was never particularized in the affidavit-in-support. What is clear from the affidavit-in-support is that the High Court delivered its decision on 22 November 1996. This means that the notice of appeal should have been served by 22 December 1996. Despite this, the appellant only filed this motion on 13 January 1997. Yet the affidavit-in-support does not disclose any explanation as to why the notice of appeal was not served on the respondent nor any reasons as to why the motion was only filed on 13 January 1997 and not earlier. There is, therefore, no evidential material on the reasons for the non-service of the notice of appeal and the delay in making the application. These factors were considered by us when exercising the discretion to grant or not the application for the extension of time (see *Pearson v Chen Chien Wen Edwin* [1991] 3 MLJ 208).

As regards the filing and serving of the record of appeal, para 6 of the affidavit-in-support shows that the appellant had applied for the notes of proceedings but had not, until the date of filing of their motion, that is 13 January 1997, received them from the High Court. There is no evidential material that can explain why the appellant did not comply with the Court of Appeal's Practice Direction No 1 of 1996 which, amongst other things, requires the appellant to immediately apply to the President of the Court of Appeal for extension of time to file the record of appeal in the event that the notes of evidence had not been supplied to the appellant within one month from the date the notice of appeal was filed. In *Yeo Yoo Teik v Jemaah Pengadilan Sewa, Pulau Pinang & Anor* [1996] 2 MLJ 54, this court had commented on the non-compliance of Practice Direction No 2/91. Siti Norma Yaakob JCA, in delivering the judgment of the court, said (at p 56):

> Practice Direction 2/91 has been especially framed to regulate the procedure governing the filing of appeal records. Although it does not have the force of law, nonetheless is must be strictly adhered to so that there is a systematic and consistent procedure governing the filing of appeals records in this court.

We find no evidential material that can throw any light on the merits of the present application. A similar situation arose in *Yeo Yoo Teik*'s case and Siti Norma Yaakob JCA commented (at p 56):

> We also took note of the fact that the affidavit-in-support makes no mention of the factual circumstances surrounding the cause of action leading to the

order appealed against. It was only before us that counsel attempted to remedy the deficiency of his affidavit by offering to state that the appeal arose out of a rent tribunal matter, for which prohibition had not been granted. It would have assisted us if counsel had at least alluded to some facts or law in his affidavit so as to show at least an arguable case. The failure to do so coupled with the delay of four weeks for which no acceptable explanation had been given, left us with no choice but to dismiss the application with costs.

In fact, in *Pearson*'s case, the chances of the appeal succeeding was one of the factors considered by this court when exercising its discretionary powers to extend time.

In the light of what had been said above, we found that there were no sufficient grounds to grant an extension of time to serve the notice of appeal and to file and serve the record of appeal on the respondent. We, therefore, dismissed the motion with costs. And as the notice of appeal had never been served on the respondent, the appeal therefore was incompetent (see *Soh Keng Hian*'s case). There was, in fact, no appeal in existence (see *Lee Lan v Lim Yoon Loy & Ors* [1991] 3 MLJ 419). On this ground, we struck out the appeal.

Appeal struck out.

Reported by David Lai